Nos. 80-207, 80-213, and 80-214

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In the Supreme Court of the United States

OCTOBER TERM, 1979

CBS INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

NATIONAL BROADCASTING COMPANY, INC. PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the Federal Communications Commission's determination that Congress intended Section 312(a)(7) of the Communications Act to provide a limited affirmative right of

access to broadcast stations for federal political candidates to supplement the well established contingent right of individual access for all political candidates.

2. Whether Congress may strike a balance between the First Amendment rights of broadcasters and the paramount First Amendment rights of the public by adopting a limited right of access as it has done in Section 312(a)(7).

3. Whether the Commission has implemented Section 312(a)(7) in a manner consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is not yet reported. The decision of the Federal Communications Commission (Pet. App. 69a-109a) is reported at 74 F.C.C. 2d 631. The Commission's memorandum opinion and order denying reconsideration (Pet. App. 110a-151a) is reported at 74 F.C.C. 2d 657.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1980. Petitions for rehearing filed by petitioners in Nos. 80-213 and 80-214 were denied on May 15, 1980. On June 4, 1980, the Chief Justice extended the time for filing the petition in No. 80-207 to and including August 11, 1980. The petition for a writ of certiorari in No. 80-207 was filed on August 11, 1980. The petitions for a writ of certiorari in Nos. 80-213 and 80-214 were filed on August 13, 1980. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the "reasonable access" provision of Section 312(a)(7) of the Communications Act of 1934, 47 U.S.C. 312(a)(7), which imposes an obligation upon radio and television broadcasters to permit the "purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." Section 312(a)(7) was enacted as part of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 4. One of the primary purposes of that legislation was "to give candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971).

1. In early October 1979, the Carter-Mondale Presidential Committee advised the three national television networks that it desired to purchase a thirty-minute time period during "prime time" on one network on December 4, 5, 6 or 7 to present a program to be run in conjunction with President Carter's announcement of his candidacy for reelection. The program was to consist of a documentary film outlining the President's record and that of his administration. The ABC and NBC networks both declined to offer any time for sale, essentially on the ground that it was too early in the presidential campaign to begin selling time for political broadcasts. The CBS network offered to sell two five-minute program segments to the Committee, one of which would be in prime time.

As a result of these responses, the Committee filed a complaint with the Commission asserting that the networks had violated the "reasonable access" provision of Section 312(a)(7) of the Communications Act by rejecting the Committee's request to purchase time. The Committee claimed that none of the reasons advanced by the networks for their refusals to sell the time requested was sufficient to justify their actions.

2. After considering the networks' responses to the Committee's complaint, the Commission found that each of the networks had acted unreasonably in responding to the Committee's request to purchase time and that they had thus failed to fulfill their obligations under Section 312(a)(7) of the Communications Act (Pet. App. 69a).

The Commission found no basis for the networks' conclusion that it was too early in the presidential campaign to begin selling time for political broadcasts. The Commission observed that an abundance of objective factual information compelled the conclusion that the presidential campaign was in "full swing" (Pet. App. 91a-

94a). Thus, the Commission determined that it was unreasonable for the networks to refuse to sell the Committee any time because of the earliness of the request (Pet. App. 94a-99a).[1] The Commission also concluded that the other reasons advanced by the networks to justify their responses to the Committee were insufficient. The Commission stressed that the networks' consideration of the request reflected the type of arbitrary, blanket policy that the Commission earlier had determined in its *1978 Report and Order* to be an improper means to implement Section 312(a)(7) (Pet. App. 98a-100a).

In a second order, the Commission denied petitions for reconsideration of its original decision (Pet. App. 110a). At the outset, the Commission rejected arguments that Congress intended Section 312(a)(7) merely to codify previous Commission practice rather than to enact a new right of access.[2] The Commission pointed out that it had

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[1]The Commission noted that, only a year earlier in a general policy statement on Section 312(a)(7), it had observed that the point when a broadcaster would be required to begin making time available would vary depending on the nature of the campaign—in some cases it might begin shortly before the election, and in others, such as presidential campaigns, it might begin as much as a year before the election (Pet. App. 88a, 91a). See *Report and Order on Enforcing Section 312(a)(7)*, 68 F.C.C. 2d 1079, 1091 (1978) (hereafter "*1978 Report and Order*"). See also Pet. App. 23a n.48.

[2]Prior to the adoption of Section 312(a)(7), the Commission had interpreted the general public interest standard of the Communications Act to impose an obligation on broadcasters to make some time available for political programming. However, under that policy, no candidate had an individual affirmative right of access to present political programming on a broadcast station; nor was any obligation imposed upon broadcasters to make time available to specific candidates. The requirement was simply that broadcasters could not refuse to present any political programming. Broadcasters were left with considerable discretion to determine what programming

rejected that argument in its 1978 Report and Order and that there was "no new or additional evidence that would warrant a departure from this construction of the statute" (Pet. App. 118a).

The Commission also observed that the threshold question of when the statutory obligations attach, *i.e.*, when broadcasters must begin affording reasonable access, is an "objective" issue that is appropriate for the Commission's independent evaluation, considering the status of the campaign, the position of the candidate and the network, and other relevant factors (Pet. App. 124a).

Because of the networks' apparent misunderstanding of the original order's discussion of the "candidate's needs," the Commission further explained the importance of, and the limitations on, that consideration. The Commission noted that the primary purpose for its focus on the candidate's needs was to ensure that broadcasters would give consideration to "each request in its own specific context on a particularized basis" (Pet. App. 126a). The Commission emphasized that "the candidate's particular request is by no means conclusive of the question of how much time, if any, is appropriate" (*id.* at 128a), but rather is only one factor to be considered in the weighing process (*ibid.*). On the other hand, the Commission ruled that a broadcaster is obligated to attempt "to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking airtime" (*ibid.*). Thus, while noting that broadcasters are not expected to evaluate or censor individual programs, or to evaluate the

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would be presented based on their reasonable, good faith judgment about the importance and public interest in particular election campaigns. See generally *1978 Report and Order, supra,* 68 F.C.C.2d at 1087-1088.

"candidate's subjective, personal, or immediate 'political' desires" (Pet. App. 127a), the Commission stated that broadcasters must "consider the particular nature of the request made so that 'as much as possible' and 'within reasonable limits' airtime will be responsive to the candidate's needs" (*id.* at 135a).

The Commission also stressed the importance of a full explanation of the broadcaster's reasons for denying a candidate's request. Requiring a full explanation, the Commission observed, is "essential to assuring that we do give careful consideration and appropriate deference, to a broadcaster's discretion [because] [we] must deal essentially with the broadcaster's own reasoning—not generally with reasons we might have relied on" (Pet. App. 136a) (footnote omitted).

3. On petition for review, the court of appeals upheld the Commission's decision. The court carefully examined the language and the legislative history of Section 312(a)(7) and concluded that it was intended to "create an affirmative right of access for individual candidates for federal elective office" (Pet. App. 22a). The court explained that such a reading of the statute was consistent with this Court's decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (hereafter "*CBS* v. *DNC*"). Although a footnote in that decision stated that Section 312(a)(7) "essentially codified" Commission policies developed prior to 1971 under the public interest standard, the court of appeals observed that such language was "not a denial that Congress had enacted, in 1971, a very specific, obligatory right of access for federal candidates" (Pet. App. 21a).

The court of appeals also concluded that, in implementing Section 312(a)(7), the Commission had "articulated reasonable standards designed to minimize governmental intrusion into broadcasting and to maximize respect for

the editorial discretion of broadcasters, while at the same time advancing the important statutory purpose of candidate access" (Pet. App. 54a). The court rejected the argument that determination by the Commission of when statutory obligations attach, *i.e.*, when broadcasters must begin affording reasonable access, was improper (see Pet. App. 24a-29a). The court held the "determination of when statutory obligations attach is not an editorial decision * * * [but rather] is purely a legal judgment" (Pet. App. 28a). It added that this determination is one "for which the Commission is better suited than either broadcasters or candidates" (*id.* at 29a). Similarly, the court found no basis for the contention that, in making this decision, the Commission would impermissibly involve itself in the election process. It pointed out that "[t]his would be true only if the Commission sought to *set a starting date* for the campaign, rather than merely *find* that it had *already begun" (id.* at 27a). The court added that "[b]y confining the applicability of Section 312(a)(7) to a period when the campaign is fully under way, the Commission has limited the statute's impact on broadcasters" (Pet. App. 29a).

The court also reviewed in detail the proceedural and substantive standards adopted by the Commission to determine whether reasonable access has been granted and found those standards rational and fair (Pet. App. 29a-42a). The court concluded that the record in this case supported the Commission's determination that the networks had failed to apply the proper standards (Pet. App. 39a-41a). The court observed that all three networks had "displayed unreasonable disregard for the relevant standards * * * [in adopting] across-the-board policies [which] violated the longstanding mandate of the Commission that, in addressing a request for access from a candidate for federal office, the broadcaster had to tailor his response to the *individual* candidate" (*id.* at 39a-40a).

Finally, the court found no basis for the contention that the statute unconstitutionally impinges upon broadcasters' editorial discretion (Pet. App. 42a-47a). The court pointed out that Section 312(a)(7) provides an affirmative right of access to a narrowly defined class of citizens only for political uses, that the Commission has developed procedures which afford substantial discretion to broadcasters, that the statute applies only during the "political season" when a campaign is fully under way, and that "Section 312(a)(7) represents only a congressional reallocation of the 'use' of portions of the airwaves from the licensee to the candidate. The broadcaster's exercise of journalistic discretion—his right to speak and editorialize—is unimpaired" (Pet. App. 46a-47a).[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petitions present no question that warrants this Court's review. That Congress enacted a limited individual right of access, as the Commission and the court of appeals concluded, is evident on the face of the statute and is supported by its legislative history. Petitioners have made no showing that the Commission's contemporaneous and subsequent uniform construction of the statute is in error.

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[3]In a concurring opinion, Judge Tamm expressed concern over potential abuses of the statute (Pet. App. 56a-68a). However, despite that potential, he concurred in affirming the Commission's decision because "section 312(a)(7) makes a tremendous positive contribution to the cause of freedom of expression" (Pet. App. 65a), because "we dare not forget that there is also a potential for evil in leaving the question of access in the hands of private broadcasting interests" (*id.* at 65a-66a), and because "the Commission's standards for implementing section 312(a)(7), as long as they are carefully followed, are sufficient to save the statute from constitutional infirmity" (*id.* at 67a).

1. Although there are constitutional claims made in this case, as there are in virtually every dispute between broadcasters and the FCC, the questions are hardly novel. The congressionally mandated scheme for "reasonable access" by individual federal candidates is no more than a limited augmentation of a well established statutory pattern of broadcast regulation, which allocates broadcast time for use by candidates for public office. This Court has repeatedly found this overall statutory plan, which balances the First Amendment rights of broadcasters and those of their listeners, to be consistent with constitutional requirements. See, *e.g.*, *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959); *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); see also *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978); *National Broadcasting Company* v. *United States*, 319 U.S. 190 (1943). The constitutional questions presented by petitioners are readily resolved under the principles of those cases. Within the statutory framework of the Communications Act, broadcasters in the political broadcast area have always been subject to special obligations, including an affirmative obligation to allocate time for political candidates generally. In addition, a candidate's individual right of access to a broadcast station, albeit on a contingent "equal opportunities" basis, has been a core element of federal regulation since 1927. That access right has always contemplated presentation of some programming over which candidates (rather than broadcasters) have editorial control. Thus, from the inception of broadcast regulation, Congress has required allocation of broadcast time for political "uses"[4] and has

[4]The term "use" refers to personal appearances by a candidate on non-exempt programs. *Primer on Political Broadcasting and Cablecasting*, 69 F.C.C. 2d 2209, 2240 (1978). Under the terms of the statute four categories of news programs are "exempt." *Id.* at 2246.

limited the normally broad scope of broadcaster discretion with respect to such political uses. Section 312(a)(7), as interpreted by the Commission, is fully consistent with that long-established statutory scheme.

Insofar as petitioners direct their arguments against the Commission's implementation of the statute, they also raise no issue warranting further review. Petitioners' claims in this regard are largely abstract and speculative. The Commission's decision here involves no government review or abridgment of editorial discretion. It merely enforces the well established Commission doctrine that broadcasters must respond individually to individual requests from candidates, rather than relying solely on across-the-board policies. Moreover, petitioners have presented no evidence of Commission interference in the editorial functions of broadcasters during the statute's eight year existence. There is no ground to assume that the statute, as interpreted by the court of appeals and the Commission, will not be implemented in a manner that respects all of the important First Amendment interests at stake.[5]

2. Petitioners contend that Section 312(a)(7) merely codified policies developed by the Commission prior to 1971 under the public interest standard of the Communications Act, and did not create a new right of access. See No. 80-207 Pet. 17; No. 80-213 Pet. 9; No. 80-214 Pet. 25. As the court of appeals correctly held, however, the

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[5]Petitioners have shown none of the "day-to-day intrusion" into the editorial process about which they speculate. If a pattern of intrusive implementation should develop, the Court can consider those issues in a case where they are directly presented. Because this statute makes such "a tremendous positive contribution to the cause of freedom of expression" (Pet. App. 65a), the Commission's administration of the statute should not be distrubed in the absence of concrete evidence of actual improprieties.

plain language of the statute demonstrates that it was intended to create a new affirmative right of access for individual federal political candidates. That interpretation of the statute is supported by the legislative history and is consistent with the Commission's long-standing construction of the provision.

The plain language of Section 312(a)(7) vests in "a legally qualified candidate for Federal elective office" the right of access to a broadcasting station to obtain broadcast time "on behalf of his candidacy." By contrast, the Commission's policy prior to 1971 gave no attention to individual candidates. Broadcasters were required only to make reasonable, good faith judgments about the importance of particular political races and, on the basis of those judgments, to determine how much time should be made available for candidates in each race. See *1978 Report and Order*, *supra*, 68 F.C.C. 2d at 1088. See also note 2, *supra*. As the court of appeals observed, "[t]he change of focus manifested in the language of Section 312(a)(7) * * * indicates that Congress was doing something different in that provision and supports the view that the legislators were creating a new right for individual candidates when they passed that provision" (Pet. App. 16a).[6] And that interpretation of the statute, as the court of appeals correctly held, finds substantial support in the legislative history.[7]

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[6]The language of the statute also limits the applicability of the right of access to individual candidates for *federal* office. The public interest standard, on the other hand, applies to all offices. The application of Section 312(a)(7) only to federal candidates "is a clear indication that candidates in *federal* elections were being singled out for something beyond the amorphous right of access created by the public interest doctrine" (Pet. App. 16a).

[7]The court's analysis rested on a number of grounds. The court pointed out that one of the primary purposes of Title I of the Federal Election Campaign Act of 1971, of which Section 312(a)(7) was a

Although petitioner CBS points out that Section 312(a)(7) was enacted against a "long tradition" of withholding affirmative rights of access to individuals (No. 80-207 Pet. 17), CBS ignores another, and equally important, aspect of that "long tradition." Historically, the Commission has required broadcasters to set aside time for political candidates under Section 315 and has accordingly limited broadcasters' discretion with respect to that time. See 47 U.S.C. 315(a); *Farmers Educational & Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959). The concept of individual access, albeit contingent, for political candidates has thus been an integral part of federal regulation of radio broadcasting since 1927. Congress' addition of the duty to afford "reasonable access" to individual federal candidates in an affirmative manner was not a remarkable event. Section 312(a)(7) represented only a limited extension of the pre-

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part, was "to give candidates * * * *greater access* to the media * * *." S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971) (emphasis supplied) (Pet. App. 17a). The court also noted that when Congress adopted Section 312(a)(7), it added language, described as a "conforming amendment," to Section 315(a) of the Communications Act, 47 U.S.C. 315(a). The court properly concluded that if Section 312(a)(7) was meant merely to codify pre-existing obligations, no such "conforming amendment" to Section 315(a) would have been required. See Pet. App. 18a. Petitioners' arguments that the legislative history evidences congressional intent to accomplish the additional goals of shortening campaigns and reducing campaign spending incorrectly assumes that the Commission's construction of Section 312(a)(7) would be inconsistent with those goals and overlooks the fact that other sections of the 1971 Act were primarily directed toward meeting those goals (See No. 80-207 Pet. 20-21; No. 80-213 Pet. 15; No. 80-214 Pet. 21). Campaigns were to be shortened by limiting application of the "lowest unit charge" provision to specified periods (see S. Rep. No. 92-96, *supra*, at 28). Campaign spending was to be reduced by the imposition of campaign expenditure limitations. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, Sections 103-106, 86 Stat. 4-8.

existing contingent individual right of access which Congress has always provided for the clearly defined and narrow class of political candidates.

Furthermore, immediately following adoption of Section 312(a)(7), and in subsequent rulings, the Commission has consistently interpreted the statute as imposing additional obligations on broadcasters.[8] That interpretation is entitled to the "great deference [afforded] to the interpretation given [a] statute by the * * * agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); see also *Ford Motor Credit Co.* v. *Milhollin*, No. 78-1487 (Feb. 20, 1980).

To support their interpretation of the statute, petitioners rely on a footnote in this Court's opinion in *CBS* v. *DNC*, *supra*, 412 U.S. at 113-114 n. 12, which observed generally that Section 312(a)(7) had "essentially codified" prior Commission policy. See No. 80-207 Pet. 18; No. 80-213 Pet. 9; No. 80-214 Pet. 27. Petitioners read far more into that footnote observation than is appropriate. The court of appeals correctly stated that the footnote was dictum which appeared in a case quite different from the present case. "[T]he Court simply had no need to pass on whether Congress had adopted the * * * limited affirmative right of access embodied in Section 312(a)(7)" (Pet. App. 21a). Moreover, the generality of this Court's observation is a sufficient indication that it was not intended to constitute a resolution of the issue presented here.

2. Petitioners assert that the constitutionality of an affirmative, individual access scheme constitutes a novel

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[8]See, *e.g.*, *Use of Broadcast Facilities by Candidates for Public Office*, 34 F.C.C. 2d 510, 538 (1972); *Licensee Responsibility Under FECA 1971*, 47 F.C.C. 2d 516 (1974); *1978 Report and Order*, *supra*, 68 F.C.C. 2d at 1088.

issue that warrants review by this Court. See No. 80-207 Pet. 13; No. 80-213 Pet. 7; No. 80-214 Pet. 18. However, prior rulings of this Court deprive the issue of virtually all of its novelty. The governing First Amendment principles are clear and well settled. In *Red Lion*[9] and *Pacifica*,[10] this Court held that the broadcasting medium occupies a unique position under the First Amendment. In contrast to the publishing industry, in which entry is open to all and mandatory public access is unnecessary, in the limited electronic spectrum, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390. While *CBS* v. *DNC*, *supra*, confirmed that substantial editorial discretion must be preserved to the broadcaster, it did not repudiate the principle that the rights of listeners and viewers are paramount. 412 U.S. at 102. Those rights merit special protection in cases such as this, where the speech at issue concerns political elections. As the Court has long recognized, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964); see also *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776-777, 786, *rehearing denied*, 438 U.S. 907 (1978).

Thus, the ruling below that Section 312(a)(7) gives primacy to the rights of the viewing audience to receive political information does not present a novel question. The only arguably unique aspect of this provision is that it creates an affirmative or initial (not merely contingent) right of access.[11] But even that right is not entirely

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[9] *Red Lion Broadcasting Co.* v. FCC, 395 U.S. 367, 386 (1969).

[10] *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[11] An affirmative or initial right of access is one that exists independent of any prior action of the broadcaster. By contrast, a contingent right of access is triggered by some previous event under the broadcaster's control (Pet. App. 14a).

unprecedented when viewed in the context of the long-standing requirement under the Communications Act that broadcasters set aside time for political candidates.[12] Since the inception of federal regulation of radio, broadcasters have been required under the "public interest" standard to afford access to political candidates. See *Programming Policy Statement*, 44 F.C.C. 2303, 2314 (1960). Section 312(a)(7), as interpreted by the Commission and the court below, is only a refinement of that more general obligation.

In contending that the opinion below is inconsistent with the holding of *CBS* v. *DNC*, *supra* (No. 80-207 Pet. 24; No. 80-213 Pet. 23; No. 80-214 Pet. 17), petitioners ignore the very different context and narrow holding of that decision. That case involved an expansive scheme of first-come, first-served access to the broadcast media for the *general public*. The court of appeals concluded that the First Amendment required broadcasters to accept paid editorial announcements from the public at large and directed the Commission, which had concluded to the contrary, to develop procedures to implement such a scheme. In reversing that decision, this Court emphasized that, in evaluating a broadcaster's First Amendment claims, "great weight [must be afforded] to the decisions of Congress and the experience of the Commission." 412 U.S. at 102. The Court added that the primary role in determining how to provide for the most efficient use of the radio spectrum belongs to Congress. Taking First Amendment objectives into account, "Congress and the Commission *could* appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee * * *." *CBS* v. *DNC*, *supra*, 412 U.S. at 125 (emphasis supplied). But the Court left room for other approaches: "Conceivably at some future date

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[12]See page 10 *supra*.

Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." *Id.* at 131.

In enacting Section 312(a)(7), Congress fashioned just such a "limited right of access that is both practical and desirable." The statute is a reasonable exercise of Congressional authority and it is entitled to the great weight that *CBS* v. *DNC* said must be afforded to legislative judgments in this area. It operates only with respect to a narrow and precisely defined group of individuals—legally qualified federal candidates—whose speech merits special protection for the benefit of the electorate as a whole.[13] Section 312(a)(7) is designed to apply only at crucial times, *i.e.* when election campaigns are in full swing. Section 312(a)(7), when applied together with Section 315, establishes a largely self-enforcing scheme. Unlike a more open-ended general access scheme, Section 312(a)(7) leaves little room for disputes over, and resulting governmental oversight of, such initial issues as which speakers have access rights, which speakers are entitled to responsive time, and how much time is to be made available.

On the other hand, the scheme provides broad discretion to broadcasters as to the scheduling and amount of time to be initially offered, so as to enable them to function smoothly in their daily operations and to minimize the governmental role.[14] In view of all of these

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[13]The Commission has adopted specific rules which define who is a "legally qualified candidate" entitled to invoke Section 312(a)(7). See 47 C.F.R. 73.1940 (1979 ed.).

[14]Petitioners' assertions that the Commission's implementation of Section 312(a)(7) has left broadcasters with little or no editorial discretion is simply not borne out by the record below. The Commission emphasized that it has confined itself to a very narrow review of broadcaster refusals to provide reasonable access (see Pet.

factors, which were not present in *CBS* v. *DNC*, there is little danger that, under Section 312(a)(7), the Commission will be drawn into a "continuing case-by-case determination of who should be heard and when." *CBS* v. *DNC*, *supra*, 412 U.S. at 127.[15]

3. The argument of petitioner NBC (No. 80-412 Pet. 10-17) that the Commission's construction of Section 312(a)(7) unconstitutionally intrudes upon the electoral process is without basis, resting on the inaccurate premise that FCC supervision of broadcasters' compliance with the statute somehow amounts to FCC control of the federal electoral process.

The court of appeals correctly held that "the Commission's determination of when the statutory obligations attach does not control the electoral process. To the contrary, the determination is controlled by the process. There is nothing offensive about such a system" (Pet. App. 27a). The Commission's consideration of the views of broadcasters and candidates, as well as more objective factors (such as newspaper coverage of elections), and its determination based thereon as to whether a campaign is sufficiently underway for the access right to attach, are government functions which the Commission must

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App. 134a-137a) and pointed out that the standards which were relevant to its review worked overwhelmingly to favor broadcaster discretion (See Pet. App. 135a). Moreover, the Commission stressed that it would evaluate complaints on the basis of a broadcaster's own explanation of its decisions with respect to access requests, not the Commission's independent view of what would have been reasonable.

[15]Since the release of the Carter-Mondale rulings, only eight rulings involving Section 312(a)(7) have been released by the Commission or its staff and in only one of those eight cases was a licensee found to have acted unreasonably. See *Kennedy for President Committee*, 46 Rad. Reg. 2d (P&F) 1539 (1980).

perform if the statute is to have force. The performance of those limited functions does not interject the Commission into the electoral process itself.[16]

Similarly, the Commission's insistence that broadcasters consider "candidates' needs" by providing individual responses tailored to each candidate's request to purchase time, rather than by adopting arbitrary, across-the-board policies that do not take into account the nature of the individual candidate's request, does not involve the Commission or the broadcaster in making a value judgment about a candidate or his campaign. The Commission has merely discharged its responsibility to promulgate policies and rules (47 U.S.C. 303(r)) which are needed to enforce a provision of the Communications Act that expressly requires broadcasters to provide "reasonable amounts of time" and "reasonable access" to individual candidates for federal office.

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[16]The Commission noted that its determination of when Section 312(a)(7) obligations attach would take into account "both the complainant's and the broadcasters' showings," as well as "independent indicia" (Pet. App. 136a n. 21; see also Pet. App. 124a, 92a-94a). Moreover, the Commission's role in determining when Section 312(a)(7) obligations attach is not materially different from its longstanding role in determining who constitutes a "legally qualified candidate" for purposes of deciding when Section 315 obligations attach. 47 U.S.C. 315.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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